# National Labor Relations Board Weekly Summary



## of NLRB Cases

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Carpenters Ohio and Vicinity Regional Council (8-CD-497; 348 NLRB No. 14)
Massillon, OH Sept. 26, 2006. Relying on the factors of employer preference, employer past practice, area practice, and economy and efficiency of operations, the Board concluded that employees of Competitive Interiors, Inc., represented by Carpenters Ohio and Vicinity Regional Council, are entitled to perform the handling of all unfinished material from the point of an employer-designated stockpile to the point of installation, and the handling of all finished material from point of delivery to point of installation, at the Target jobsite in Massillon, Ohio.

[HTML] [PDF]

(Chairman Battista and Members Liebman and Kirsanow participated.)

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Coastal Cargo Co., Inc. (15-CA-17862; 348 NLRB No. 32) New Orleans, LA Sept. 29, 2006. The Board adopted the administrative law judge's recommended order and held that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes in the wages, hours, and other terms and conditions of employment of its unit employees represented by Teamsters Local 270. The judge found that the parties had not reached a goodfaith impasse in negotiations when the Respondent implemented its last contract proposal on Oct. 17, 2005, and that the changes resulting from the implementation violated the Act. [HTML] [PDF]

The Board, in adopting the judge's finding that the parties had not reached impasse, relied particularly on the fact that the parties did not have an adequate opportunity to bargain because, while they agreed to discuss the economic proposals at future meetings, the Respondent presented its final offer before they had an opportunity to do so. See *Ead Motors Eastern Air Devices*, 346 NLRB No. 93, slip op. at 4-5 (2006). It also relied on the fact that the Respondent demonstrated that further movement was possible by presenting the Union with multiple final offers after indicating that it had reached a point where it could not bargain further. See *Duane Reade, Inc.*, 342 NLRB 1016, 1017 (2004).

(Members Schaumber, Kirsanow, and Walsh participated.)

Charge filed by Teamsters Local 270; complaint alleged violation of Section 8(a)(1) and (5). Hearing at New Orleans on June 12, 2006. Adm. Law Judge Michael A. Marcionese issued his decision June 30, 2006.

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*Croft Metals, Inc.* (15-RC-8393; 348 NLRB No. 38) McComb, MI Sept. 29, 2006. Chairman Battista and Members Schaumber and Kirsanow applied the definitions for "assign" and "responsibly to direct" set forth in the *Oakwood Healthcare* decision to find that the lead persons at the Croft Metals manufacturing facility did not exercise supervisory authority under the Act. [HTML] [PDF]

After finding that the lead persons did not possess the authority to "assign" under the Act, the Board then found that the lead persons responsibly directed their line or crew members. The Board found that the lead persons were required to manage their assigned teams, to correct

improper performance, to shift employees, and to decide the order in which work was to be performed in order to achieve production goals. The Board further found that the lead persons were held accountable for the performance of their crew or line members.

The Board then found that Croft failed to meet its burden to establish that the lead persons exercised independent judgment in directing their crew or line members. The Board found that the lead persons' exercise of judgment was either fundamentally controlled by preestablished guidelines, such as delivery schedules, or was simply routine. Accordingly, the Board found that the lead persons did not exercise supervisory authority under the Act.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

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ELC Electric, Inc. (25-CA-28270-1, et al.; 348 NLRB No. 17) Indianapolis, IN Sept. 28, 2006. The Board granted the General Counsel's motion for partial summary judgment as to the following paragraphs and Appendixes of the compliance specification: Paragraphs 1-5, 6(b), 7(b), 8(b), 9(b)-(e), 10-11, 15-16, 20-21, 34(a), 36-37, 41-42, 46-47, 50(a)-(b), 52-53, 57-58, 62-63, 67-68, 71(a)-(b), 73-74, 78-79, 88-89; Appendixes A, C, E, K, M, O, Q, S, U, W, Y, AA, and EE. It denied the General Counsel's motion as to Paragraphs 25-26, 30-31, 34(b), 83-84; and Appendixes G-J and CC-DD. [HTML] [PDF]

The Board remanded the proceeding to the Regional Director to arrange a hearing before an administrative law judge limited to evidence concerning the paragraphs of the compliance specification as to which summary judgment was not granted.

In an earlier decision reported at 344 NLRB No. 144 (2005), the Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off three named employees and an undetermined number of unnamed employees because of their union activities. The Board ordered that the Respondent make the affected individuals whole for any lost earnings and other benefits resulting from their unlawful layoffs. A controversy having arisen over the amounts of backpay and benefits due under the Board's Order, the Regional Director issued a compliance specification and notice of hearing.

The Board found that the Respondent, in its amended answer, failed to provide support for its assertions that some employees were "not eligible to work all of the hours" set forth in the compliance specification or were "not available for 80 hours" during certain periods, and that the General Counsel's "calculations of gross backpay are inaccurate" for some employees. The Respondent also failed to provide alternative figures as to what hours the individuals were eligible or available to work, or what amounts are proper for gross backpay. The corresponding allegations in the compliance specification were deemed admitted to be true. The Board found however that summary judgment regarding the gross backpay and other amounts for Ronald Hamilton, Matthew Aldrich, and Benjamin Adair was not appropriate because the Respondent set forth specific alternative figures for the pay rates of these three individuals and, accordingly raised a factual issue regarding their pay rates.

(Members Liebman, Schaumber, and Kirsanow participated.)

General Counsel filed motion for partial summary judgment June 20, 2006.

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Southern Monterey County Hospital d/b/a George L. Mee Memorial Hospital (32-CA-17687-1, 32-RC-4664; 348 NLRB No. 15) King City, CA Sept. 29, 2006. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by various acts, including: Supervisor Virginia Rojas' coercively interrogating employees, creating the impression of surveillance, and threatening job loss in mid to late August; Rojas' ban on talking about the Union during "work hours" made on numerous occasions; and Rojas telling employees that they were liars and backstabbers after the ballot count on Oct. 7, 1999. The Board also adopted the judge's finding that the Respondent violated Section 8(a)(1) by maintaining and enforcing overbroad no-solicitation/no-distribution and no-access rules for employees. [HTML] [PDF]

It severed Case 32-RC-4664 from Case 32-CA-17687-1 and remanded Case 32-RC-4554 to the Regional Director to open and count the ballots cast by Lynn Clausen, Maryanne Woodford, Beth Bartel, Grasiela Sanchez, and Maria Rodriguez, to issue a revised tally of ballots, and for further appropriate action.

The Board found it unnecessary to pass on certain of the judge's unfair labor practice findings, including some that were not alleged in the complaint, because the additional violations would be cumulative and would not affect the remedy. Member Schaumber also found it unnecessary to pass on these unfair labor practices found by his colleagues: Supervisor Margeret Johnson's alleged coercive interrogation and threat of job loss of employees Mullanix-Ackerman and Williams; Supervisor Denise Miller's alleged coercive interrogation of Mullanix-Ackerman; and Barroso's threatening employees with unspecified reprisals. He did not reach the question of whether Rojas violated Section 8(a)(1) by calling the employees "liars."

Chairman Battista and Member Schaumber, with Member Walsh dissenting in part, reversed the judge's findings that the Respondent violated Section 8(a)(1) by the statements about striker replacement made by Supervisor Johnson on Aug. 5, 2000; by Rojas' Oct. 1 statement that all unions do is take employees' money; by Respondent's CEO Walter Beck's alleged solicitation of grievances at an Oct. 1 employee meeting; by Rojas' Oct. 1 alleged threats of job loss, reduction of wages, and loss benefits; by Rojas' Oct. 6 statement about striker replacement and questioning employee Natividad Felix and Henrietta Perez about a union flier; by Rojas' stating that employees do not need a union; and by maintaining a no-solicitation/no-distribution rule applicable to nonemployees; and violated Section 8(a)(3) by refusing to allow Mullanix-Ackerman to rescind her resignation or to rehire her.

Contrary to his colleagues, Member Walsh would affirm the judge's finding that: (1) CEO Beck unlawfully solicited grievances and impliedly promised to remedy them; (2) Rojas unlawfully interrogated employees Natividad Felix and Henrietta Perez; (3) the

Respondent unlawfully refused to allow surgical technician Mullanix-Ackerman to withdraw her resignation; and (4) the Respondent violated the Act by maintaining a policy prohibiting solicitation and distribution by nonemployees on its premises.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Health Care Workers SEIU Local 250; complaint alleged violation of Section 8(a)(1) and (3). Hearing at King City, June 20, July 18-21 and 26, 2000. Adm. Law Judge Mary Miller Cracraft issued her decision Jan. 11, 2001.

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Beverly Enterprises-Minnesota, Inc., d/b/a Golden Crest Healthcare Center (18-RC-16415, 16416; 348 NLRB No. 39) Hibbing, MN Sept. 29, 2006. Applying the definitions for "assign" and "responsibly direct" set forth in *Oakwood Healthcare*, Inc., 348 NLRB No. 37, Chairman Battista and Members Schaumber and Kirsanow found that Golden Crest's charge nurses at a nursing home did not exercise supervisory authority under the Act. [HTML] [PDF]

First, the Board found that the charge nurses at issue lacked the authority to "assign" other employees under the Act, emphasizing that Golden Crest failed to establish that the charge nurses possessed the authority to require other employees to stay past the end of their shifts, to come in from off-duty status, or to shift section assignments.

The Board further found that the charge nurses at issue lacked the authority to "responsibly direct" other employees under the Act, insofar as Golden Crest failed to establish that the charge nurses were actually held accountable for the job performance of other employees. The Board found that the "accountability" requirement set forth in *Oakwood Healthcare* was not satisfied by Golden Crest's evidence that it had a practice of rating charge nurses in their annual evaluations on their performance in directing other employees. The Board found that this evidence constituted merely "paper" accountability and was insufficient to establish that there was an actual prospect that the charge nurses' terms and conditions of employment could be affected, either positively or negatively, as a result of their performance in directing other employees. Accordingly, having found that the charge nurses at issue neither "assigned" nor "responsibly directed" other employees within the meaning of Section 2(11) of the Act, the Board found that the Golden Crest charge nurses were statutory employees, not supervisors.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

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*Hi-Tech Interiors, Inc.* (17-CA-22916; 348 NLRB No. 18) Manhattan, KS Sept. 28, 2006. The Board found, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to consider applicants for hire, or failing and refusing to hire applicants because of their support for the Carpenters District

Council of Kansas City & Vicinity. Specifically, it agreed that by refusing to hire, and to consider hiring, William Rogers and Bruce Hildebrandt because it knew from their applications that they intended to organize employees on behalf of the Union, the Respondent violated the Act. The Board also agreed with the judge that Field Superintendent Martin Baumgard violated Section 8(a)(1) by coercively interrogating applicant Woody Hall. [HTML] [PDF]

In exceptions, the Respondent argued that it is inappropriate to order instatement and backpay for Rogers and Hildebrandt without making those remedies conditional on their first passing the mandatory drug screening and physical capacity tests that all new employees must pass before beginning work. The Board said that in the circumstances of this case, passing the test is a condition of instatement and, therefore, the Respondent should be permitted to administer these tests, and it will not be required to hire a discriminatee who failed either test.

With respect to backpay, the Board wrote:

[I]f either discriminatee fails a test, that does not necessarily mean he would have done so during the time of the Respondent's discrimination in 2004. However, a present-day test failure is sufficient to raise an inference that the discriminatee would have also failed the test in 2004 at the time of the discrimination. . . . Consequently, upon showing of a test failure, the burden should shift to the General Counsel to go forward with evidence that the discriminatee would have passed the test if administered at the time of the Respondent's unlawful conduct. The ultimate burden of persuasion remains with the wrongdoing Respondent. Thus, if the evidence on the record as a whole is in equipoise, then the Respondent will not prevail in its claim that backpay should be limited based on the test results.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charge filed by Carpenters District Council of Kansas City and Vicinity; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Manhattan on April 12, 2005. Adm. Law Judge Albert A. Metz issued his decision June 20, 2005.

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Human Development Assn. (29-CA-9367; 348 NLRB No. 35) Brooklyn, NY Sept. 29, 2006. The Board, in this supplemental decision, adopted the recommended order of the administrative law judge that the Respondent make whole its employees by paying a total of \$634,543.18 as specified in the compliance specification, as amended, plus interest. It agreed with the judge that the General Counsel is entitled to summary judgment on the amount of reimbursement owed to employees for years 1981-1987, because the Respondent failed to prove that its 1981-1987 records were unavailable for reasons other than the Respondent's own negligence. [HTML] [PDF]

Member Schaumber said he "reluctantly" joined his colleagues in adopting the judge's decision. He wrote: "The 13-year delay between enforcement and the issuance of the compliance specification in this case remains difficult to fathom or excuse. Such extended delays are plainly prejudicial to the interests of affected parties and weaken the credibility of the Board in the eyes of those we protect and regulate."

A controversy having arisen over the amount of backpay due the employees under the terms of the Board's order (293 NLRB 1228 (1989)), enforced by the U.S. Court of Appeals for the D.C. Circuit on July 9, 1991, the Regional Director issued a compliance specification on June 30, 2004, alleging the amount of backpay due to 3082 claimants. The Board had found that the Respondent violated Section 8(a)(1), (2), and (3) of the Act by recognizing Federation Health Professionals Local 6, Longshoremen at a time when Local 6 did not represent a valid majority, and by executing and enforcing union security and check off clauses in a collective-bargaining agreement. The backpay period began on June 24, 1981, the date of the execution of the contract, and ended on June 24, 1981, the date that the Respondent ceased deducting dues and fees from its employees' wages.

(Members Schaumber, Kirsanow, and Walsh participated.)

Hearing at Brooklyn, Feb. 7 and 27, 2006. Adm. Law Judge Steven Fish issued his supplemental decision May 31, 2006.

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Metro Demolition Co., Inc., Phantom Demolition Corp., Circle Interior Demolition, Inc., World Class Demolition Corp., Alter Egos (29-CA-27317, et al.; 348 NLRB No. 21) Maspeth and Long Island City, NY Sept. 27, 2006. The Board denied the General Counsel's motion for partial default judgment and remanded the proceeding to the Regional Director for further appropriate action. [HTML] [PDF]

The consolidated complaint alleges that Respondents Metro, Circle, World Class, and Phantom are a single employer; that World Class is an alter ego of Phantom; that Phantom and Circle are alter egos of Metro; and that Metro, Circle, World Class, and Phantom violated Section 8(a)(1), (3), and (5) of the Act. World Class filed a timely answer to the consolidated complaint. Metro, Circle, and Phantom did not file answers by the due date.

The General Counsel sought summary judgment against Respondents Metro and Circle on the ground that they failed to file timely answers to the consolidated complaint. No motion was filed as to Phantom. The Board denied the General Counsel's motion on the basis that World Class' timely filed answer serves to preclude the entry of a default judgment against Respondents Circle and Metro. It wrote: "The Board has declined to enter default judgment against a nonanswering respondent in circumstances where its alleged liability was derivative and stemmed from its alleged status as a single employer with (or alter ego of) another respondent who had filed a timely answer."

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Teamsters Local 813; complaint alleged violation of Section 8(a)(1), (3), and (5). General Counsel filed motion for partial default judgment June 19, 2006.

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National Steel & Shipbuilding Co. (21-CA-36772; 348 NLRB No. 23) San Diego, CA Sept. 28, 2006. The Board adopted the recommendations of the administrative law judge and found that the Respondent violated Section 8(a)(5) and (1) of the Act by on or about Feb. 18, 2005, appointing a union health and safety representative. [HTML] [PDF]

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Boilermakers; complaint alleged violation of Section 8(a)(1) and (5). Hearing at San Diego, Nov. 14-15, 2005. Adm. Law Judge William N. Cates issued his decision March 15, 2006.

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Newspaper and Mail Deliverers' Union of New York and Vicinity (2-CB-20110; 348 NLRB No. 19) New York, NY Sept. 28, 2006. The Board upheld the administrative law judge's finding that the Respondent Union violated Section 8(b)(3) of the Act by failing and refusing, since on or about Sept. 8, 2004, to execute a written contract embodying the agreement reached on or about Aug. 25, 2004, with NYP Holdings, Inc. [HTML] [PDF]

(Members Schaumber, Kirsanow, and Walsh participated.)

Charges filed by NYP Holdings, Inc.; complaint alleged violation of Section 8(b)(3). Hearing at New York, Aug. 9-10, 2005. Adm. Law Judge Steven Davis issued his decision Nov. 9, 2005.

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Oakwood Healthcare, Inc. (7-RC-22141; 348 NLRB No. 37) Taylor, MI Sept. 29, 2006. The Board set forth guidelines for determining whether an individual is a supervisor under the National Labor Relations Act. In this decision, with a 3-2 vote, the Board held that the permanent charge nurses employed by the Employer, Oakwood Heritage Hospital, an acute care hospital, exercised supervisory authority in assigning employees within the meaning of Section 2(11) of the Act. [HTML] [PDF]

The Board found that the charge nurses, as a regular part of their duties, assigned nursing personnel to the specific patients for whom they would care during their shift. The Board found that such assignments, which consisted of giving "significant overall duties" to an employee, met the statutory definition of "assign" under the Act. The Board further found that the Employer met its burden to show that its charge nurses exercised independent judgment in making such assignments. Finally, the Board found that the Employer failed to establish that the rotating charge nurses exercised supervisory authority for a "substantial" part of their work time. As a

result, the Board found that only the Employer's permanent charge nurses were supervisors, rather than employees, under the Act. The majority opinion is signed by Chairman Battista and Members Schaumber and Kirsanow. Members Liebman and Walsh dissented.

In *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Supreme Court criticized the Board's extant interpretation of the Section 2(11) term "independent judgment." As a result, the Board endeavored in this *Oakwood Healthcare* decision to reexamine and clarify its interpretations of the term "independent judgment" as well as the terms "assign" and "responsibly to direct," as those terms are set forth in Section 2(11). The Board proffered the following definitions.

The Board defined "assign" as the act of "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee." Further, to "assign" for purposes of the Act, "refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task."

The Board then defined the statutory term "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible' . . . and carried out with independent judgment." The Board held that the element of "responsible" direction involved a finding of accountability, so that it must be shown that the "employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary" and that "there is a prospect of adverse consequences for the putative supervisor" arising from his/her direction of other employees.

Finally, consistent with the Supreme Court's decision in *Kentucky River*, the Board adopted an interpretation of the term "independent judgment" that applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise. The Board defined the statutory term "independent judgment" in relation to two concepts. First, to be independent, the judgment exercised must not be effectively controlled by another authority. Thus, where a judgment is dictated or controlled by detailed instructions or regulations, the judgment would not be found to be sufficiently "independent" under the Act. The Board further found that the degree of discretion exercised must rise above the "routine or clerical" in order to constitute "independent judgment" under the Act.

In dissent, Members Liebman and Walsh disagreed with the majority's definitions of the statutory terms "assign" and "responsibly to direct," and further disagreed with the majority's finding that the employer's charge nurses exercise supervisory authority in "assigning" other employees.

The dissent contends that the majority erred in defining the term "assign" to include the act of assigning overall tasks to employees. In the dissent's view, the assigning of tasks to

employees is a "quintessential function of the minor supervisors whom Congress clearly did <u>not</u> intend to cover in Section 2(11)." Accordingly, the dissent would define "assign" under the Act as the act of determining "an employee's position with the employer," an employee's "designated work site," or an employee's "work hours."

The dissent also disagrees with the majority's definition of "responsibly to direct," contending that the drafters of Section 2(11) only intended the phrase to include "persons who were effectively in charge of a department-level work unit, even if they did not engage in the other supervisory functions identified in Section 2(11)." As a result, the dissent would require the following showing to establish that a putative supervisor has the authority to "responsibly direct": The individual has been delegated substantial authority to ensure that a work unit achieves management's objectives and is thus "in charge"; the individual is held accountable for the work of others; and the individual exercises significant discretion and judgment in directing his or her work unit.

(Full Board participated.)

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Operating Engineers Local 150 (13-CD-746; 348 NLRB No. 33) Elmhurst, IL Sept. 29, 2006. The Board determined that employees of Patten Industries, Inc. represented by Operating Engineers Local 150, rather than those represented by Machinists Local 701, are entitled to use hoses and pumps to dump oil and fill lube trucks at the Patten Industries facility in Elmhurst, IL, and to operate the Track Press for work performed by Patten Industries, Inc. at its facility in Elmhurst, IL in repairing track links brought in from the field by field technicians. It reached this conclusion relying on the factors of employer preference, current assignment, and economy and efficiency of operations. [HTML] [PDF]

(Members Schaumber, Kirsanow, and Walsh participated.)

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Salmon Run Shopping Center, LLC (3-CA-24578; 348 NLRB No. 31) Watertown, NY Sept. 29, 2006. The Board held, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(1) of the Act by denying Carpenters Empire State Regional Council, Local 747 access to its mall for purposes of distributing union literature, but it relied on a different rationale. [HTML] [PDF]

Citing *Lechmere*, *Inc.* v. *NLRB*, 502 U.S. 537, the Board noted that the Supreme Court has established two exceptions to its general rule that an employer cannot be compelled to permit union agents to distribute literature on the employer's property. First, an employer violates Section 8(a)(1) by denying a union access to its property where the union has no other reasonable means of communicating its organizational message (the "inaccessibility exception"). See *Lechmere*, supra, 502 U.S. at 533-535. Second, an employer violates Section 8(a)(1) by

prohibiting nonemployee distribution of union literature if its actions "discriminate against the union by allowing other distribution" (the "discrimination exception"). *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

The Board concluded that the Respondent excluded the Union from its property because it is a labor organization and that the discriminatorily motivated exclusion violated Section 8(a)(1) under the "discrimination exception" as set forth in *Babcock & Wilcox*.

(Members Liebman, Kirsanow, and Walsh participated.)

Charge filed by Carpenters Empire State Regional Council, Local 747; complaint alleged violation of Section 8(a)(1). Hearing at Syracuse on July 28, 2004. Adm. Law Judge Joel P. Biblowitz issued his decision Sept. 28, 2004.

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Success Village Apartments, Inc. (34-CA-10622, et al.; 348 NLRB No. 28) Bridgeport, CT Sept. 29, 2006. The administrative law judge found, and the Board agreed, that the Respondent committed numerous violations of Section 8(a)(5), (4), (3), and (1) of the Act from the summer of 2003 to the fall of 2004, including unilaterally changing existing terms and conditions of employment for unit employees by implementing a "Conflict of Interest" policy, removing a phone from an employee work area, and engaging in numerous acts of retaliation against Una Boulware, Dennis Brown, Lloyd Reid, and Tony Teja because of their activities for Auto Workers Local 376 and/or their prior Board testimony. [HTML] [PDF]

In a reversal of the judge, the Board found that the Respondent did not violate Section 8(a)(5) by unilaterally implementing a new parking policy. As a result of the Respondent's new policy, employees now have to walk approximately 200 additional yards from their vehicles to the main building. Relying on *United Parcel Service*, 336 NLRB 1134 (2001), the judge found that employee parking is a mandatory subject of bargaining, and that the Respondent had an obligation to bargain with the Union over the change. The Respondent argued that the parking policy's effect on working conditions was de minimis and therefore, it had no obligation to bargain over the change. The Board agreed.

(Members Liebman, Kirsanow, and Walsh participated.)

Charges filed by Auto Workers Local 376; complaint alleged violation of Section 8(a)(1), (3), (4), and (5). Hearing at Hartford, Dec. 6-10, 2004, Jan. 25-28, Feb. 1-3, March 14-17, 21-24 and 28 and 30, 2005. Adm. Law Judge Wallace H. Nations issued his decision May 16, 2006.

Sutter Health Center d/b/a Sutter Roseville Medical Center (20-CA-30946-1; 348 NLRB No. 29) Roseville, CA, Sept. 29, 2006. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(1) of the Act by notifying certain unit employees that their reinstatement would be delayed for 4 days, and violated Section 8(a)(3) and (1) by delaying the reinstatement of certain strikers and by closing its cafeteria and thereby delaying reinstatement of the strikers employed there. [HTML] [PDF]

The Board approved the judge's finding that the Respondent violated Section 8(a)(3) with respect to those economic strikers replaced by Respondent's in-house supervisory and managerial employees. It found merit in the General Counsel's exceptions that the Respondent also violated Section 8(a)(3) by delaying the reinstatement of strikers replaced by the Respondent's in-house, nonunit employees.

This case involves the reinstatement of strikers following a 1-day economic strike at the Respondent's health care institution on Nov. 14, 2002. The Union, Health Care Workers SEIU Local 250, notified the Respondent on Nov. 1 of the impending strike and its duration and, at the same time, made an unconditional offer to return to work on Nov. 15 on behalf of the strikers. The Respondent determined that it would continue operations during the strike using temporary replacements and decided it would schedule all replacements for a 5-day period and that it would close the cafeteria, in which certain unit employees regularly worked, for 5 days in connection with the strike. On Nov. 6, the Respondent informed unit employees that if there were a strike "[r]eplacement staff will provide services for the full 5 days to provide continuity in patient care." At the end of the 1-day strike, the Respondent refused to reinstate the strikers until the announced 5-day period had elapsed.

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with an opportunity to bargain about the terms and conditions of employment of nonunit replacements after they ceased to be lawful striker replacements during the 4-days between the end of the strike and the date the Respondent set for the strikers to return. Chairman Battista and Member Schaumber found it unnecessary to pass on this matter because finding the 8(a)(5) violations would not materially affect the remedy in light of the finding of an 8(a)(3) violation and the associated make-whole remedy. Contrary to her colleagues, Member Liebman would find that the Respondent violated Section 8(a)(5) by unilaterally assigning unit work to nonunit employees, and unilaterally deciding to keep its cafeteria closed during the period when the striking employees should have been reinstated.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Health Care Workers SEIU Local 250; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Sacramento, Feb. 5-6, 2004. Adm. Law Judge Clifford H. Anderson issued his decision April 20, 2004.

Starwood Hotels & Resorts Worldwide, Inc. d/b/a W San Diego (21-CA-36384; 348 NLRB No. 24) San Diego, CA Sept. 29, 2006. Chairman Battista and Member Schaumber, with Member Liebman dissenting, agreed with the administrative law judge that the Respondent did not violate Section 8(a)(1) of the Act when it prohibited an employee from wearing a union button in public areas of the Respondent's hotel. Members Liebman and Schaumber, with Chairman Battista dissenting, adopted the judge's finding that the Respondent violated Section 8(a)(1) of the Act by prohibiting the same employee from wearing a union button in nonpublic areas. [HTML] [PDF]

Citing *Pathmark Stores, Inc.*, 342 NLRB 378, 379 (2004); *Alba Plastics*, 335 NLRB 923, 924 (2001), the Board wrote that an employer may lawfully restrict the wearing of union insignia where "special circumstances" justify the restrictions. A unanimous Board reversed the judge's finding that the Respondent violated Section 8(a)(1) by prohibiting another employee from wearing union stickers in the hotel kitchen, a nonpublic area. It reasoned that health and safety concerns may constitute special circumstances—the danger that the loosely-attached stickers would fall into the food or onto food preparation surfaces justified restrictions on employees' right to wear union insignia.

Regarding the display of the union button in public areas, the judge found that the Respondent proved special circumstances—interference with the Respondent's public image—justified the no-button order while in-room delivery (IRD) server Sergio Gonzalez was in public areas where he would come in contact with guests. Chairman Battista and Member Schaumber noted that the button would have interfered with the Respondent's use of a particular in-room server uniform (professionally-designed all-black shirt, slacks, and apron) to create a special atmosphere for hotel customers.

Member Liebman disagreed with her colleagues' adoption of the judge's finding that the Respondent established "special circumstances" justifying its ban on wearing union buttons in public areas. She believes that the Respondent has submitted no evidence demonstrating that the Union's 2-inch square button would detract in any significant way from the Respondent's efforts to create a "wonderland" atmosphere and that the Respondent has failed to carry its burden of demonstrating that the employees' wearing of the Union's button on their uniforms in public areas could interfere with the creation of that atmosphere as to warrant the Respondent's ban.

Chairman Battista found that the Respondent demonstrated special circumstances justifying its order prohibiting IRD server Gonzalez from wearing the union button in public areas of the hotel. Contrary to his colleagues, he found that the Respondent demonstrated special circumstances—the impracticality of requiring Gonzalez to remove the union button each time he entered a public area—justified its order prohibiting Gonzalez from wearing the button in public and non-public areas.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Hotel & Restaurant Employees Local 30; complaint alleged violation of Section 8(a)(1). Hearing at San Diego on Dec. 7, 2004. Adm. Law Judge Lana H. Parke issued her decision Jan. 21, 2005.

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The Wackenhut Corp. (1-CA-42113; 348 NLRB No. 30) Plymouth, MA Sept. 29, 2006. Members Schaumber and Kirsanow agreed with the administrative law judge that the Respondent neither discharged nor constructively discharged employee Timothy Charette in violation of Section 8(a)(1) of the Act. They wrote that "the entire course of the Respondent's words and actions would not reasonably lead a prudent person in Charette's position to believe, when he later resigned, that his employment had been terminated." [HTML] [PDF]

Member Liebman, dissenting, found that Charette reasonably believed that he had been, or was about to be, unlawfully fired and that it is appropriate to hold the Respondent responsible for his resignation and liable for remedying its wrongdoing. She relied on case law that the Board must view the situation "through the [employee's] eyes and not as the employer would have viewed them," and must hold the employer "responsible when its statements or conduct create an uncertain situation for the affected employee[]." *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 846 (2001), quoting *Brunswick Hospital Center*, 265 NLRB 803, 810 (1982).

No exceptions were filed to the judge's finding that the Respondent violated Section 8(a)(1) by suspending Charette.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charge filed by Security, Police and Fire Professionals (SPFPA); complaint alleged violation of Section 8(a)(1). Hearing at Boston, Dec. 12-13, 2005. Adm. Law Judge David L. Evans issued his decision Jan. 23, 2006.

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Wal-Mart Stores, Inc. (16-CA-20391-1, et al., 16-RC-10181; 348 NLRB No. 16) Palestine and Jacksonville, TX Sept. 28, 2006. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Food & Commercial Workers Local 540 about the effects of its decision to convert the meat department at its Jacksonville, TX store from a boxed meat to a case-ready operation, and by refusing to furnish Local 540 with requested information that was relevant and necessary for engaging in effects bargaining. In the absence of a complaint allegation that the Respondent's refusals to bargain for a contract before July 15, 2000 were unlawful, the Board reversed the judge's finding of an 8(a)(5) allegation covering the March-to-July 15, 2000 time period. [HTML] [PDF]

The judge found that the Respondent violated Section 8(a)(5) by refusing Local 540's bargaining requests between March and July 15, 2000, but that it did not unlawfully refuse to bargain with Local 540 after July 15, based on his finding that, by July 15, the meat-department unit at the Jacksonville store was no longer an appropriate unit for collective bargaining due to the Respondent's completion of a long-planned conversion of its meat department from a "boxed"-meat area operation to a "case-ready" operation.

The Board agreed with the judge that the meat-department became inappropriate by July 15, after the case-ready program was implemented and that the Respondent did not violate Section 8(a)(5) after July 15 by refusing to bargain with Local 540 for an initial contract.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Food & Commercial Workers Locals 455 and 540; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Tyler, Nov. 18-22, 2002. Adm. Law Judge Keltner W. Locke issued his decision June 10, 2003.

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Washoe Medical Center, Inc. (34-CA-18511-1, et al.; 348 NLRB No. 22) Reno, NC Sept. 29, 2006. No exceptions having been filed, the Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by interfering with protected employee solicitation and distribution. The Board also adopted the judge's finding that the Respondent violated Section 8(a)(1) by denying union representation to bargaining unit employees at grievance meetings, but it found it unnecessary to pass on his conclusion that this conduct also violated Section 8(a)(3). [HTML] [PDF]

Chairman Battista and Member Schaumber affirmed the judge's recommended dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) by declaring impasse on April 6, 2001, and implementing its economic proposals. Member Liebman would find that the impasse was tainted by the Respondent's ongoing refusal—found unlawful in *Washoe Medical Center*, 337 NLRB 202 (2001)—to bargain over starting wages for new hires. Chairman Battista and Member Schaumber found that the General Counsel failed to establish a causal nexus between the unfair labor practice of the prior case and the impasse in this case.

The Board reversed the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally discontinuing its pay-for-performance merit pay system for unit employees. Contrary to the judge, it found that the parties discussed the proposed change during their negotiations, and the Union acquiesced in the change.

Chairman Battista and Member Schaumber reversed the judge's finding that the Respondent violated Section 8(a)(1) by interrogating employees regarding a potential strike. The interrogation issue arose when immediately following service upon the Respondent of the Union's strike notice, the Respondent sent a letter and preprinted response card to unit

employees informing them that it had received the strike notice and stating in part: "[W]e need to know whether you intend to work or not. Please indicate your decision on the enclosed response card and return it to the Nursing Administration Office by 4:00 p.m. on Tuesday, June []. If you do not complete and submit the enclosed response card by this date, we must assume you intend not to work on June 26."

The judge found that the Respondent violated the Act by failing to assure unit employees "that there would be no reprisals for failing to answer the interrogatory." Chairman Battista and Member Schaumber said "the judge has parsed the contents of the Respondent's prestrike letter and enclosed response card so finely as to rob that correspondence of its clear, commonsense meaning and, as well, to defeat the limited privilege accorded to employers to questions employees on matters related to their Section 7 rights under conditions established in *Johnnie's Poultry*," 146 NLRB 770 (1964), enfd. denied 344 F.2d 617 (1965). Member Liebman would find the letter coercive.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Operating Engineers Local 3; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Reno, Oct. 2-4, 2001. Adm. Law Judge Jay R. Pollack issued his decision Jan. 9, 2002.

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E.C. Waste, Inc. d/b/a Waste Management de Puerto Rico (24-CA-9997, 10064; 348 NLRB No. 26) San Juan and Caguas, PR Sept. 29, 2006. Affirming the administrative law judge's decision, the Board held that the Respondent violated the Act during the less than 1 month period between when employees working at the Respondent's Coqui San Juan and San Juan Transfer facilities voted in favor of Union de Tronquistas de Puerto Rico, Local 901, Teamsters. Specifically, the Board found that the Respondent violated Section 8(a)(5) and (1) by unilaterally eliminating the supplemental bonus for employees at its Coqui San Juan facility without first giving the Union notice and an opportunity to bargain. [HTML] [PDF]

There were no exceptions to the judge's finding that the Respondent, by Supervisor Pablo de Jesus, violated Section 8(a)(1) by threatening employees with unspecified reprisals at a Dec. 2004 meeting with employees at the Respondent's San Juan Transfer facility. No exceptions were filed to the judge's dismissal of the remaining 8(a)(1) complaint allegations.

In affirming the judges 8(a)(5) finding regarding the supplemental bonus, Chairman Battista and Member Schaumber distinguished *North American Pipe Corp.*, 347 NLRB No. 78 (2006), in which the Board held that an employer's substantial one-time grant of stock to its employees was not subject to bargaining because it was a gift rather than wages or remuneration for work. They noted that the bonus here, unlike the grant of stock in *North American Pipe*, was given to employees annually for a number of years and was explicitly characterized by the Respondent as a part of employees' "salaries and benefits." Chairman Battista and Member

Schaumber found it unnecessary to pass on the judge's conclusion that the Respondent's elimination of the supplemental bonus violated Section 8(a)(3) in addition to Section 8(a)(5) because it would not materially affect the remedy.

Member Walsh found it unnecessary to distinguish *North American Pipe*, as he dissented from the majority in that case, and he would adopt the judge's finding that the Respondent's conduct with regard to the supplemental bonus violated both Section 8(a)(3) and (5).

The Board modified the judge's recommended order to require, among others, posting of the notice to employees at both of the Respondent's facilities (Coqui San Juan and San Juan Transfer) where it found that unfair labor practices occurred. In the event hat the Coqui San Juan facility has closed, the modified Order provides for the mailing of the notice.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Union de Tronquistas de Puerto Rico, Local 901, Teamsters; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at San Juan on March 2, 2006. Adm. Law Judge Paul Bogas issued his decision July 19, 2006.

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#### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Cibao Meat Products, Inc. (UNITE-HERE Local 169) Bronx, NY Sept. 25, 2006. 2-CA-36943; JD(NY)-42-06, Judge Eleanor MacDonald.

Crossing Recovery Systems, Inc. d/b/a Crossings Rehabilitative Services, Inc. (Novelty and Production Workers Local 298) Islip Terrace, NY Sept. 25, 2006. 29-CA-26118, et al.; JD(SF)-46-06, Judge Joseph Gontram.

*Teamsters Local 589* (Jennings Distribution, Inc.) Bremerton, WA Sept. 25, 2006. 19-CB-9427; JD(SF)-50-06, Judge Gregory Z. Meyerson.

Rock Valley Trucking Co., Inc. (an Individual) Janesville, WI Sept. 25, 2006. 30-CA-16997; JD-72-06, Judge Earl E. Shamwell Jr.

*Valcourt Exterior Building Services of New Jersey, L.C.* (Painters District Council 711) Elizabeth, NJ Sept. 26, 2006. 22-CA-26385; JD(NY)-43-06, Judge D. Barry Morris.

*Delmas Conley d/b/a Conley Trucking* (Teamsters Local 92) Portsmouth, OH Sept. 26, 2006. 9-CA-42437, 42562; JD-73-06, Judge David I. Goldman.

Michigan Road Maintenance Co., LLC, d/b/a Michigan Roads Maintenance Co., LLC (an Individual) Trenton, MI Sept. 26, 2006. 7-CA-46891; JD-74-06, Judge Eric M. Fine.

*Cincinnati Children's Hospital Medical Center* (Carpenters Ohio & Vicinity Regional Council) Cincinnati, OH Sept. 27, 2006. 9-CA-42740; JD(ATL)-36-06, Judge Margaret G. Brakebusch.

Dean Transportation, Inc. and Dean Transportation Employees Union (Grand Rapids Educational Support Personnel Association Michigan Education Association) Grand Rapids, MI Sept. 27, 2006. 7-CA-49003, 7-CB-15014; JD(ATL)-37-06, Judge Michael A. Marcionese.

Linens of Europe, Inc. and its subsidiary S Duran L, as a single employer (Laundry, Dry Cleaning & Allied Workers Joint Board) Bronx, NY Sept. 27, 2006. 2-CA-37585; JD(NY)-41-06, Judge Mindy E. Landow.

Steelworkers District 7 and Decorators Local 17 (Individuals) Chicago, IL Sept. 28, 2006. 13-CB-18232, et al.; JD(ATL)-32-06, Judge Lawrence W. Cullen.

SFO Good-Nite Inn, LLC (UNITE HERE! Local 2) South San Francisco, CA Sept. 28, 2006. 20-CA-32754; JD(SF)-51-06, Judge Jay R. Pollack.

*Rocket Hill, Inc.* (Carpenters Empire State Regional Council, Local 7) Hicksville, NY Sept. 29, 2006. 29-CA-26844, 26861; JD(NY)-45-06, Judge Steven Fish.

Sprain Brook Manor Nursing Home, LLC (New York Health and Human Services Union 1199/SEIU) Scarsdale, NY Sept. 29, 2009. 2-CA-37258, 37448; JD-76-06, Judge Michael A. Rosas.

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#### NO ANSWER TO COMPLAINT

(In the following cases, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

*Michael Allen Logue d/b/a Black Diamond Framing* (an Individual) (28-CA-20699; 348 NLRB No. 20) Chandler, AZ Sept. 27, 2006.

*Alrod Enterprises, Inc.* (Security, Police and Fire Professionals) (4-CA-34334; 348 NLRB No. 36) Philadelphia, PA Sept. 29, 2006.

Synergy International (an Individual) (5-CA-33009; 348 NLRB No. 34) Joppa, MD Sept. 29, 2006.

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#### NO ANSWER TO COMPLIANCE TO SPECIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the compliance specification.)

Action Temporary Employment a/k/a Action Multi-Craft (Electrical Workers [IBEW] Locals 654 and 313) (4-CA-23898, et al., 348 NLRB No. 13) Sept. 25, 2006.

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#### **TEST OF CERTIFICATION**

(In the following case, the Board granted the General Counsel's motion for summary judgment on the grounds that the Respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding.)

Sprain Brook Manor Nursing Home, LLC (New York Health and Human Services Union 1199/SEIU) (2-CA-37787; 348 NLRB No. 48) Scarsdale, NY Sept. 29, 2006.

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### LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers)

#### DECISION AND DIRECTION OF SECOND ELECTION

First Student, Inc., Park City, IL, 13-UD-495, Sept. 26, 3006 (Chairman Battista and Members Liebman and Walsh)

#### DECISION AND CERTIFICATION OF REPRESENTATIVE

*Innovative Facility Services, LLC*, New York, NY, 2-RC-23113, Sept. 28, 2006 (Members Schaumber, Kirsanow, and Walsh)

#### DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Western Aggregates, LLC, Marysville, CA, 20-RD-2417, Sept. 29, 2006 (Members Liebman, Schaumber, and Kirsanow)

## DECISION, DIRECTION, AND ORDER [remanding to Regional Director to open and count ballots]

Rockspring Development, Inc., East Lynn, WV, 9-RC-17844, Sept. 29, 2006 (Members Schaumber, Kirsanow, and Walsh)

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(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

#### DECISION AND CERTIFICATION OF REPRESENTATIVE

Hudson Healthcare, Inc. d/b/a Hudson Elms Nursing Home, Hudson, OH, 8-RC-16836, Sept. 28, 2006 (Members Schaumber, Kirsanow, and Walsh)

Country Fresh, L.L.C. and Melody Farms, L.L.C., Livonia, Detroit, and Hamtraamck, MI, 7-RM-1476, Sept. 28, 2006 (Members Schaumber, Kirsanow, and Walsh)

#### DECISION, ORDER, AND CERTIFICATION OF REPESENTATIVE

Metro-Intermodal, Ltd., Lansing, IL, 13-RC-21511, Sept. 28, 2006 (Members Schaumber, Kirsanow, and Walsh)

Metropolitan Security Services, Inc. d/b/a Walden Security Services, Atlanta, GA, 10-RC-15592, Sept. 28, 2006 (Members Schaumber, Kirsanow, and Walsh)

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(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Individual Advocacy Group, Inc., Romeoville, IL, 13-RC-21518, Sept. 28, 2006(Members Schaumber, Kirsanow, and Walsh) [remanded to Regional Director]Deutsche Post Global Mail, Chicago, IL, 13-RD-2468, Sept. 28, 2006 (Members Schaumber and Kirsanow; Member Walsh dissented)

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(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Biosure Landscaping Services, LLC, Xenia, OH, 9-RC-18086, Sept. 28, 2006 (Members Schaumber, Kirsanow, and Walsh)

#### Miscellaneous Board Orders

## DECISION AND ORDER REMANDING [to Regional Director for further appropriate action]

MCS Consultants, Inc., Long Island City, NY, 29-RC-11339, Sept. 25, 2006 (Members Schaumber, Kirsanow, and Walsh)

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